EVIDENCE – HEARSAY – Admissions of party-opponent are not hearsay – Revised 3/2010

Rule 801(d)(2), Ariz. R. Evid., provides that certain statements by parties are not hearsay. A statement is not hearsay if:

> **(2) Admission by party-opponent**. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The determination of whether a statements is an admission by a party-opponent is within the discretion of the trial court. *State v. McDaniel,* 136 Ariz. 188, 196, 665 P.2d 70, 78 (1983); *State v. Schad*, 129 Ariz. 557, 570, 633 P.2d 366, 379 (1981).

The party's own statement:

The party's own statement need not amount to a confession to be an "admission" under this rule. In *State v. Maturana,* 180 Ariz. 126, 130, 882 P.2d 933, 937 (1994), the defendant contended that his statements to the police should not have been admitted pursuant to Rule 801(d)(2), Ariz. R. Evid., "because they were not 'confessions,' i.e., they were not 'admissions tending to prove the facts or circumstances relating to his guilt.'" Some of his "statements" consisted of silence in response to police questions. The Arizona Supreme Court said that the defendant's "answers to the detective's questions were certainly admissible as relevant statements by a party opponent," *citing State v. Atwood*, 171 Ariz. 576, 619, 832 P.2d 593, 636 (1992). The Court went on to

clarify that Rule 801(d)(2), Ariz. R. Evid., does not limit admissibility of parties' statements to "confessions":

> We have never required that a defendant's statement be a full "confession," however the term is defined, to be admissible. His statement need only be relevant and be offered against him. [Citation omitted.] Defendant's statements to the police regarding his whereabouts and actions on the day of the murder were clearly relevant. Moreover, many of his statements would have been admissible independently as impeachment during or after defendant's trial testimony.

Maturana, 180 Ariz. at 130, 882 P.2d at 937. In *State v. Rienhardt,* 190 Ariz. 579, 588, 951 P.2d 454, 463 (1997), the State introduced threats that Rienhardt had made to kill the victim. The Arizona Supreme Court found no error, noting that Rienhardt's threatening statements were not hearsay under Rule 801(d)(2)(A).

In *Atwood,* friends questioned Atwood on the night of the murder about what appeared to be blood on his hands, and Atwood responded that he had stabbed a man in a drug dispute. Atwood later claimed that he made up the story of stabbing someone because he was trying to appear to be "tough" for his friends. On appeal, Atwood argued that the friends should not have been allowed to testify because his statement to them was hearsay and irrelevant. The Arizona Supreme Court noted that Atwood's statements were not hearsay because they were admissions of a party-opponent. 171 Ariz. at 635, 832 P.2d at 652.

Statement adopted by a party:

Rule 801(d)(2)(B) provides that a statement is not hearsay if "[t]he statement is offered against a party and is . . . a statement of which he has manifested his adoption or belief in its truth." In *State v. Miller,* 135 Ariz. 8, 17, 658 P.2d 808, 815 (App. 1982), the defendant spoke to a detective who took notes of what the defendant said. At the

end of the interview, the detective showed the defendant the notes; the defendant reviewed them for accuracy and initialed each page. The State argued that by reviewing and initialing the detective's notes, "the defendant manifested his adoption of those notes and his belief in their truth, and that they thus became an admission by a party opponent and were properly admitted." The Court of Appeals agreed, noting that, while the statement was prejudicial because it showed that the defendant originally did not tell the officers the truth, the defendant did adopt the statement as his own by reviewing it for accuracy and initialing it. Thus, the notes were not hearsay and were properly admitted.

Coconspirators' statements:

Finally, Rule 801(d)(2)(E) establishes as nonhearsay any statement made by a coconspirator of a party during the course and in furtherance of the conspiracy.

> A coconspirator's statements are admissible " 'when it has been shown that a conspiracy exists and the defendant and the declarant are parties to the conspiracy.' " *State v. White*, 168 Ariz. 500, 506, 815 P.2d 869, 875 (1991), *cert. denied*, 502 U.S. 1105, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992) (*quoting State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980)). Here, the state alleged there was a conspiracy between defendant and Robison to cover up their involvement in the Bolles murder and to obstruct the investigation and prosecution of the case.

State v. Dunlap, 187 Ariz. 441, 458, 930 P.2d 518, 835 (App. 1996). In *Dunlap*, the defendant claimed that certain diary entries by a coconspirator should have been excluded because the diary entries were not made in furtherance of the conspiracy. The Court found that the trial court acted within its discretion in finding that the diary entries revealed an intent to advance the goals of the conspiracy, even if they did not actually advance those goals.

> When inquiring whether a statement of a coconspirator was made in furtherance of the conspiracy, courts focus on the intent of the coconspirator in advancing the goals of the conspiracy, not on whether the statement has the actual effect of advancing those goals. *See United States v. Nazemian*, 948 F.2d 522, 529 (9th Cir.1991), *cert. denied*, 506 U.S. 835, 113 S.Ct. 107, 121 L.Ed.2d 65 (1992) (interpreting federal rule of evidence that is identical to Arizona rule). So long as some reasonable basis exists for concluding the statement furthered the conspiracy, the "in furtherance" requirement is satisfied. [*United States v.*] *Doerr*, 886 F.2d [944] at 952 [(7th Cir.1989)]. We will only reverse if the trial court abused its discretion in determining that statements of a coconspirator met the rule's requirements and were admissible.

Id. Finding no abuse of discretion, the Court held that the diary entries were properly admitted as coconspirator statements.

A conspiracy need not be charged as long as the record reveals sufficient reliable evidence of a conspiracy to support the admission of the statements of the co-conspirator. *State v. White,* 168 Ariz. 500, 506, 815 P.2d 869, 875 (1991), *abrogated on other grounds by State v. Salazar*, 173 Ariz. 399, 844 P.2d 566 (1992**)**; *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980). The court, not the jury, determines whether a conspiracy exists so as to make coconspirators' statements admissible.

> It is generally accepted in determining the admissibility of statements of a co-conspirator under rule 801(d)(2)(E) that the jury has no input as to admissibility. . . . Jurors do not rule on admissibility -- that is the sole province of the trial court. Once the judge determines admissibility the question becomes one of instruction. As such, the jury determines only the weight and credibility of the co-conspirator's statements.

White, 168 Ariz. at 505, 815 P.2d at 874.